UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RONALD J. RANKIN and LIZ RANKIN,	)	
Plaintiffs	)	
v.	)	Civil No. 01-45-B-K
RIGHT ON TIME MOVING & STORAGE, INC., et al.	)	
Defendants	)	

MEMORANDUM OF DECISION[1]

Defendant, Allstate Insurance Company ("Allstate") moves for summary judgment on the Rankins' Count III breach of contract claim, Count IV breach of supplemental contract claim, Count VI claim for declaratory judgment, Count VII claim for violation of the Maine late payment statue, and Count VIII claim for unfair claims settlement practices. (Docket No. 26.) I **GRANT** Allstate's motion for summary judgment on Counts IV and VII and **DENY** summary judgment on Counts III and VI. Further, I **GRANT** partial summary judgment as to Count VIII to the extent it alleges violations of 24-A M.R.S.A. § 2436-A(1)(A) - (D).

Summary Judgment

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter at law." Fed. R. Civ. P. 56(c). A fact is "material" when it has the "potential

[1] Pursuant to Federal Rule of Civil Procedure 73(b) the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A "genuine issue" exists when the evidence is "sufficient to support rational resolution of the point in favor of either party." Id. Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The evidence is to be viewed, and justifiable inferences are to be drawn, in the non-moving party's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Facts[2]

While the Rankins lived in California, they purchased a homeowners' insurance policy from Allstate (hereinafter "the policy") on their San Jose home. According to the Rankins, they spoke with their Allstate agent prior to moving to Maine and she advised against canceling the homeowners' policy because they would be "fully covered" if anything happened to their property during the move. In reliance on this statement, the Rankins refrained from canceling their policy and from purchasing additional moving insurance coverage.

On July 24, 2000, the Rankins learned they had suffered a loss when the moving company failed to deliver their household goods as required by the contract. In late July or early August of 2000, Mr. Rankin spoke with Allstate's independent adjuster, Peter Poirier of Nomad Adjusters, about their loss. During the month of August, Poirier took

[2] Allstate has not responded to the Rankins' additional statement of material facts, thus pursuant to Dist. Me. Loc. R. 56(e) the facts contained in the Rankins' additional statement of facts are deemed admitted to the extent they are supported by the record.

two recorded statements from Mr. Rankin and appraised the damaged items. On September 24, 2000, Mr. Rankin sent Poirier an updated list of damaged items and "missing" items and their estimated values.

Beginning September 24, 2000, Allstate's communications with the Rankins were conducted through the Rankins' attorney, A. J. Greif. On September 28, 2000, Greif sent Allstate a letter demanding payment on the Rankins' claim. The certified mail return receipt indicated that the letter was received October 2, 2000. Greif received a letter dated October 3, 2000, from Allstate's claims supervisor, Bob Toolin. Toolin enclosed a copy of the policy's listed perils and advised Greif that the only peril applicable to the Rankins' loss is the "vehicle" peril. Further, Toolin stated that he had requested Poirier, the adjuster, to contact an appraiser to assist in determining the value of the Rankins' damaged property. Angie Graves was selected to conduct the appraisal, which she performed some time in October of 2000, according to the Rankins. Other than the October 3rd letter, Allstate never notified Greif in writing that it required additional information.

In a December 14, 2000 letter, Greif advised Toolin that he believed the Rankins' loss was covered under the theft peril as well as the vehicle peril. Further, Greif stated that the Rankins would be referencing Maine's Unfair Claims Practices Act in any litigation if Allstate did not promptly dispute the Rankins' claim for damages. Greif was not asked by Allstate to provide additional information regarding the applicability of the theft peril. At this time, the most recent claim the Rankins had submitted was their September 24, 2000 updated list of damaged items and missing items.

It is undisputed that the policy's theft peril provision defines "theft" to include "disappearance of property from a known place when it is likely that a theft has occurred." The policy's definition requires that "any theft must be promptly reported to the police." The Rankins did not immediately report a theft to the police because they were waiting to see if the moving companies, Right-On-Time Moving & Storage and SI Trucking, would be able to locate their missing items. On December 19, 2000, the Rankins did report a theft to the police. At this point the Rankins concluded that enough time had passed to justify the conclusion that the missing items were no longer likely to be found.

Due to Poirier's illness, Allstate did not receive Graves' appraisal report until January 11, 2001. Although the Rankins state that Graves conducted the appraisal in October of 2000, it is not clear when Graves completed this report and submitted it to Poirier. However, approximately two weeks after Allstate received the appraiser's report, Toolin sent Greif a property loss worksheet on January 23, 2001, listing the items Allstate identified as covered under the vehicle peril provision and listing Toolin's determination of their actual cash value. In regard to actual cash values, the Allstate policy provides:

> If you do not repair or replace the damaged, destroyed or stolen property, payment will be on an actual cash value basis. This means that there may be a deduction for depreciation... .

(Pls.' Resp. Statement of Material Facts (PRSMF) ¶ 41.)

The property loss worksheet Allstate sent the Rankins contains values that are different from Graves' appraisal (hereinafter "the Graves appraisal"). Allstate's worksheet valued the bed frame at $58.74, instead of the Graves appraisal value of $60. Allstate allotted $40 for the oak and brass table, instead of listing the appraisal value of $1,500. The Rogers Sculpture is listed at $4,000 instead of the appraiser's value of $8,000. The Sony

receiver is listed at $251 instead of the appraiser's value of $400. Allstate allotted no value for the entertainment center, which was appraised at $4,000. The difference between the appraiser's value and Allstate's value on these items totals $6,247.99. After reviewing the worksheet and the Graves appraisal, Greif found that the worksheet did not include all of the items listed on the appraisal. Specifically, a drafting table, a coffee table, a wheelchair, a treadmill, a large Portmeirion bowl, and a Portmeirion soup bowl with plate are not included. The appraisal value on these items totals $4,059. However, with the one exception of the large Portmeirion bowl, these items were not included on the Rankins' September 24, 2000 list. (See First Toolin Aff. ¶ 12, Ex. D & F).

Enclosed with the property loss worksheet was a letter dated January 23, 2001, from Toolin explaining the property loss worksheet. He wrote that many of the Rankins' claimed items are not listed on the worksheet because the items are missing, have missing parts, or were dragged by the movers. He also explained why the status of the Rogers Sculpture remained in question. Additionally, Toolin requested information for co-insurance purposes regarding the Rankins' new homeowners' carrier.

A few weeks later, on the twelfth and thirteenth of February 2001, Toolin and Greif agreed by phone and in writing that Allstate would tender its "proportionate share of the undisputed loss." (Def. Statement of Material Facts (DSMF) ¶ 14.) The parties agreed that Allstate's payment would be made without prejudice to the Rankins' right to challenge Toolin's assigned actual cash values on the items covered under the vehicle peril; right to assert that the items previously designated as "missing" were covered under the theft peril; and right to seek reformation of the policy terms. At the time of this agreement, the Rankins' September 24, 2000 list of damaged items and "missing" items

continued to be the most recent list submitted by the Rankins. When Greif sent a letter to Toolin on February 13, 2001 to confirm their agreement, Greif enclosed a two-page list of the Rankins' boxed items that were never delivered. Mr. Rankin created this list at the suggestion of Greif and had recently completed the arduous inventory process involved with creating the list. The Rankins had parted with 230 boxes in California and received only 170-180 in Maine, thus the inventory process took months to complete. In his February 13, 2001, letter, Greif indicated that as of that date he calculated the minimum total loss of all damaged items and missing items to be $97,583.00.

Pursuant to their February agreement on the damaged property loss, Toolin tendered payment on February 28, 2001, to the Rankins for Allstate's pro-rata share[3] of the undisputed amount of the loss. Greif received the check on March 2, 2001, in the amount of $6,247.99. That same day the Rankins initiated the present action.

The Rankins mailed their initial mandatory disclosures to Allstate on June 1, 2001. The Rankins included three lists of damages and stated that they have $20,989.19 in damaged property loss and $76,170.15 in stolen property loss. Approximately two weeks later, the Rankins sent supplemental disclosures with three revised lists reporting $23,509.19 in damaged property loss and $82,495.27 in stolen property loss.

Later that year, in October of 2001, an Allstate attorney requested a copy of the Rankins' police report, which was promptly provided. Following the March 2001, initiation of the present action, Allstate did not seek to take the Rankins' depositions, however, the Rankins' other insurance company, former co-defendant Concord General

[3] The Rankins originally sued Concord General Mutual Insurance Co., their Maine homeowners' insurer. However the allocation of liability between Allstate and Concord has been resolved and Concord has settled with the Rankins under terms agreeable to Allstate.

Mutual Insurance Co. ("Concord"), took the Rankins' depositions on December 6, 2001. A few weeks later, on December 26, 2001, the Rankins received a check from Allstate on their theft loss in the amount of $38,500.00. They also received a letter dated December 19, 2001, from Allstate demanding that the parties undergo the appraisal process provided in the policy for determining the amount of the Rankins' loss. Up to this time, neither party had requested the use of the policy's appraisal process. The Rankins' attorney responded to Allstate's demand in a December 27, 2001 letter stating that the Rankins were not willing to proceed through the appraisal process. The Rankins explained that their rejection was based, in part, on the fact that the present action had been underway for nearly a year and a trial was imminent, that Allstate already had the opportunity to conduct three appraisals, that Allstate had previously breached its contract, and that the Rankins had already disposed of most of the damaged items. At this time, the present action was scheduled for trial to commence on February 11, 2002. The only damaged items Mr. Rankin had not disposed of were the bed frame, the typewriter, the Ron Rogers Sculpture, a shadow box, and a treadmill.

From the time of the Rankins' move to present, Allstate has never taken the position that the Rankins' policy was not in effect when the Rankins' property loss occurred.

Discussion

A. Count III: Breach of Contract

As the facts relating to the Rankins' damaged property loss and the theft loss differ, the two types of losses will be discussed separately.

1. The Rankins' Damaged Property Loss

Count III alleges Allstate breached its insurance contract with the Rankins by failing to pay the amount due under the policy and failing to pay within a reasonable time. (Am. Compl. at 4.) Allstate seeks summary judgment on this count contending that there are no material facts in dispute and that it paid the undisputed portion of the Rankins' claim for damaged items. Allstate establishes that it received the Rankins' September 28, 2000 claim and their September 24, 2000 list of damaged property for which they sought coverage. In an October 3, 2000 letter to the Rankins, Allstate requested that an appraiser assist the parties in determining the values of the damaged property. Further, the letter informed the Rankins that the only applicable policy provision that covered their loss was the "vehicle" peril provision.[4] Following an appraisal and subsequent communications, Allstate and the Rankins entered into an agreement February 13, 2001, that Allstate would pay its proportionate share of the undisputed damaged property loss. Pursuant to this agreement, Allstate sent the Rankins a check for $6,247.99 representing Allstate's proportionate share of the undisputed amount of the Rankins' damaged property loss. Based on these undisputed facts, Allstate argues it did not breach the insurance contract and is entitled to summary judgment.

In order to overcome Allstate's motion for summary judgment, the Rankins, who have the burden at trial of demonstrating that a breach of contract occurred, must respond by showing there is a genuine issue of disputed facts. See Celotex , 477 U.S. at 322. The Rankins argue there is a material fact in dispute because Allstate has not paid the full amount of the loss they claimed. In arguing that a disputed material fact exists, the

[4] Although not specifically defined in the record, the vehicle peril provision apparently allows coverage for damage to property that occurred in connection with a vehicle.

Rankins' response presents two issues: (1) Allstate's worksheet does not include all of the items contained in the appraisal; and (2) Allstate incorrectly determined the value of the damaged property.

The Rankins' first argument asserts that Allstate's property loss worksheet does not include several items listed on the Graves appraisal. This worksheet appears to have been central to the February 13, 2001 agreement. (See First Toolin Aff. ¶ 12.) There is no dispute that at the time of the February 13, 2001 agreement, the September 24, 2001 list was the most recent list of damaged property the Rankins had submitted to Allstate. The worksheet contains all of the items contained in the September 24 list, except a large Portmeirion bowl. (See First Toolin Aff. ¶ 12, Ex. D & F.) It is not clear why the bowl was omitted from the worksheet. The Rankins specifically argue that the property loss worksheet did not include five other damaged items: a drafting table, coffee table, wheelchair, treadmill, and a Portmeirion soup bowl with plate. However, the Rankins did not list these five items on their September 24 list. Further, the Rankins do not argue nor do they establish in the record that they submitted a claim or otherwise added these five items to their claim before the February agreement or since the agreement. As the Rankins have not established that these five items were included in their claim, there is no disputed fact on this point. The only disputed fact at issue here relates to the large Portmeirion bowl that was included on the Rankins' September list but not carried over to Allstate's worksheet.[5] (Poirier Ex. D.)

[5] The record indicates that the property loss worksheet only included property from the September 24 list that was damaged as a result of the vehicle peril. (First Toolin Aff. ¶ 11.) However, the worksheet contains items from the September 24 list that were damaged due to causes other than vehicle peril. Notations such as "water damaged" or "dropped" follow these items so as to explain the reason a value is not determined for these items. (Id. Ex. F.) The large Portmeirion bowl, appraised at eighty-nine dollars, is the only damaged item listed on the September 24 list (Id. Ex. D) that is not contained within the worksheet.

The Rankins' second argument involves Allstate's valuation of the Rankins' property. The Rankins assert that although Allstate paid the undisputed claim, a genuine issue of fact exists because Allstate did not present evidence establishing how it arrived at its actual cash values. Specifically, the Rankins argue that Allstate arbitrarily valued five items on the property loss worksheet at a value lower than the Graves appraisal value. The five items and values at issue are a bed frame (appraised at $60 / Allstate valued at $58.74), an oak and brass table (appraised at $1,500 / Allstate allotted $40), Rogers Sculpture (appraised at $8,000 / Allstate valued at $4,000), a Sony receiver (appraised at $400 / Allstate valued at $251), and an oak entertainment center (appraised at $4,000 / Allstate valued at zero). (PRSMF ¶ 31.)

Allstate establishes in its statement of material facts that it used "actual cash values" on the worksheet. Toolin described how he determined these values. (DSMF ¶ 13; First Toolin Aff. ¶ 12.) In his affidavit Toolin states:

> I prepared the property loss worksheet... based upon the inventory presented in Mr. Rankin's letter of September 24, 2000. The dollar values applied to the inventory are values presented by the Rankins, Angie Graves, Nomad Adjustment and an outside vendor, Insurers' World. The difference between my inventory and that of Angie Graves is that Ms. Graves' appraisal included items that were not damaged by the peril of vehicle. The Sony receiver I priced through a vendor called Insurers' World. I applied an allowance of $4,000.00 for the Rogers Sculpture until more information could be provided.

(First Toolin Aff. ¶ 12.)

The January 23, 2001 letter accompanying the worksheet informed the Rankins that Allstate would only cover the items damaged by vehicle peril, not items that the movers dragged, items that were missing, or items with missing parts, including the unresolved Rogers sculpture. (First Toolin Aff. Ex. E.)

Allstate used the $58.74 value for the bed frame assumedly because that is the amount the Rankins paid when they replaced it. (Poirier Aff. Ex. B.) As the excerpt above states, Allstate obtained a quote from Insurer's World on the Sony receiver and applied that value rather than the appraiser's value. (First Toolin Aff. ¶ 12.) Neither the record nor the Rankins suggest that the appraiser's determination of value was binding on Allstate. Thus, in relation to the bed frame and the receiver, the record indicates how Allstate arrived at the values it used. The Rogers Sculpture, the entertainment center, and the table and chair set, appear to have created difficulties because these items are not only damaged, but also have missing parts. (DSMF ¶ 13; Greif Aff. Ex. F; First Toolin Aff. ¶ 12, Ex. E and F.) It is not clear from the record whether these items were included in Allstate's December 2001 payment for the Rankins' theft loss. Thus, on these items there is a dispute of material fact as to whether Allstate has paid the full amount it may be liable for under the policy. The parties also have a continuing dispute regarding the value of the "missing" items.

2. The Rankins' Theft Loss

Allstate argues it fulfilled its obligations under the insurance contract by paying the undisputed amount of the Rankins' theft loss. Allstate asserts there are no material facts in dispute on this issue. According to Allstate, the Rankins were given the benefit of the doubt as to whether the claim for missing items qualified as a theft claim. Further, Allstate paid the undisputed amount of the Rankins' theft loss and are willing to undergo the appraisal process to resolve any remaining disputes as to property value. Thus, they argue they have fulfilled their obligations under the contract and summary judgment should be granted in their favor.

Initially, Allstate took the position that the items the Rankins claimed as missing in their September 24, 2000 list were not covered because the policy's theft peril provision did not cover items that were missing. This was expressed in Allstate's October 3, 2000 response to the Rankins' demand for payment on their claim for damaged items and missing items. In December 2000, the Rankins believed sufficient time had passed to allow a conclusion that their missing items would not be located by the movers and must have been stolen. The Rankins filed a police report on December 19, 2000 reporting a theft. Within the same week, the Rankins demanded Allstate pay for their loss on these items under the policy's theft peril provision. Later, in mid-February of 2001, the Rankins sent Allstate a supplemental list of "theft" items to add to the Rankins' September 24, 2000 list. Two weeks later, on March 2, 2001, the Rankins initiated the present action against Allstate. Allstate did not request a copy of the police report until October 2001, eight months after the Rankins submitted the supplemental list of missing/stolen items. On December 26, 2001, the Rankins received from Allstate a check in the amount of $38,500.00 and a letter requesting that the parties undergo the policy's appraisal process to determine the amount of the Rankins' loss.

The Rankins assert that Allstate has not paid the full amount of their claim for stolen property, which totals $82,495.27 and further that Allstate breached the contract by not paying the theft claim in a reasonably timely fashion. Although the Rankins acknowledge that any dispute regarding the property values might have been dealt with through the policy's appraisal process, they argue Allstate breached the contract by paying too little too late and is therefore not entitled to invoke the appraisal process. It is clear from the record that Allstate's payment of $38,500.00 is only a portion of the theft

loss claimed by the Rankins. (See First Toolin Aff. Ex. H.) Thus, there is a material dispute as to whether Allstate has paid the full amount of its liability in accordance with its contractual obligation to pay in a reasonably prompt fashion.

Further, the parties dispute the point at which the Rankins' loss should have been considered a theft and thereby covered under the policy's theft peril. Allstate suggests in their motion that it was not convinced that the missing items fell under the theft peril until it learned during discovery the extent of the Rankins' unsuccessful efforts to locate these items. The Rankins argue that Allstate could have obtained the same information prior to the December 2001 discovery. Based upon the record generated for purposes of summary judgment, it would certainly be possible for a factfinder to conclude that Allstate could have made the determination that the "missing" property was stolen well prior to December, 2001, the Rankins having filed their police report a year earlier.

Based on the foregoing analysis, summary judgment on Count III is not appropriate.

B. Count IV: Breach of Supplemental Contract

Count IV alleges that an agent of Allstate assured the Rankins their property was "fully covered" in association with their move and further assured them they did not need to purchase additional moving insurance. (Am. Comp. at 5.) The complaint states this assurance coupled with the Rankins' subsequent reliance creates an enforceable supplemental insurance contract. In their motion for summary judgment, Allstate argues there is no need to resort to the terms of a supplemental or oral contract because Allstate has never denied that the Rankins' policy remained in effect during the Rankins' move to Maine. Alternatively, Allstate requests that Count IV be dismissed for failure to state a

claim. The Rankins concede this count "may be superfluous" now that Allstate has assumed liability for both the damaged property loss and the "theft" loss. Nonetheless, the Rankins insist there is a trialworthy issue regarding "what is meant by the phrase 'fully covered' and whether that phrase encompasses replacement value as opposed to actual cash value." (Pls.' Resp. Mot. Summ. J. (PRMSJ) at 5.) In ¶ 4 of the Rankins' response to defendant's statement of material facts, the Rankins clearly state that in reliance upon the agent's statement "the Rankins did not cancel their policy with Allstate." (PRSMF ¶ 4.) This statement references a portion of Mr. Rankin's deposition that reveals the following:

> Mr. Rankin: ... So I went ahead and said, well, let me double check. So I gave [the agent] a call shortly thereafter, and exactly like Liz informed me, she informed me of the same thing. I would be fully covered, and as she put it, it would be a waste [to purchase additional insurance]. Don't throw your $700 out the window, she said.
> Question: So is it your – was it your understanding based on that discussion or those two discussions that your Allstate homeowner's policy would follow the moving van across the country?
> Mr. Rankin: Absolutely.
> Question: And that the coverage that you had for your home would follow the van across the country?
> Mr. Rankin: Absolutely.

(Ron Rankin Depo. at 89-90.)

Thus the terms of any supplemental contract for insurance are identical to the terms of the insurance contract that is the subject of Count I and which Allstate concedes was in full force and effect throughout the move. Allstate is entitled to judgment as a matter of law on Count IV.

C. Count VI: Declaratory Judgment

In Count VI, the Rankins allege that Allstate and Concord refused to pay the amounts due on the Rankins' property loss although both insurance policies were in effect at the time of their move and both covered vehicle and theft perils. (Am. Compl. at 6-7.) The Rankins seek a declaratory judgment that the property loss associated with their move is covered under the Allstate and Concord insurance policies. Allstate moves for summary judgment on the basis that there is no genuine controversy because the allocation of liability between Allstate and Concord has been resolved and Concord has settled with the Rankins under terms agreed to by Allstate. Allstate also requests that Count VI be dismissed for failure to state a claim.

In response, the Rankins argue that although their claim against Concord has tentatively been resolved, the Rankins are still entitled to a declaratory judgment of their rights under the Allstate policy. The Rankins argue there is a genuine controversy as to the amounts Allstate owes them and a declaratory judgment would appropriately resolve that matter. If the only remaining dispute between Allstate and the Rankins concerns the proper valuation of the loss and the reasonableness of Allstate's processing of the claim in regard to the theft loss, I do not see the point of this declaratory judgment count. Once Allstate agreed in December, 2001, that the "missing" property was covered under the theft provision, it appears to me that plaintiffs' request for a declaratory judgment of their rights under the policy was moot. However, the parties have not fully briefed this issue in the motion and at this juncture I will allow the count to go forward, recognizing that it does not demand any additional relief to that sought in the breach of contract claim.

D. Count VII: Violation of Late Payment Statute, 24-A M.R.S.A. § 2436

The Rankins' Count VII alleges that Allstate violated the late payment statute, 24-A M.R.S.A. § 2436, which in part states:

> (1) A claim for payment of benefits under a policy or certificate of insurance delivered or issued for delivery in this State is payable within 30 days after proof of loss is received by the insurer and ascertainment of the loss is made either by written agreement between the insurer and the insured... or by filing with the insured...an award by arbitrators as provided for in the policy. ...A claim that is neither disputed nor paid within 30 days is overdue. If, during the 30 days, the insurer, in writing, notifies the insured or beneficiary that reasonable additional information is required, the undisputed claim is not overdue until 30 days following receipt by the insurer of the additional required information... .
>
> (3) If an insurer fails to pay an undisputed claim or any undisputed part of the claim when due, the amount of the overdue claim or part of the claim shall bear interest at the rate of 1 1/2% per month after the due date.

24-A M.R.S.A. § 2436(1) & (3).

This statute is penal in nature and is to be strictly construed. Marquis v. Farm Family Mut. Ins. Co., 628 A.2d 644, 651 (Me. 1993).

Allstate seeks summary judgment on the ground that the late payment statute does not apply unless the Rankins' loss has been ascertained either by written agreement between the parties or by an award of arbitrators. Allstate asserts that neither occurred here until Allstate ultimately determined the undisputed amounts, which Allstate paid soon thereafter. The Rankins respond by arguing that Allstate cannot argue that the Rankins' claim is not yet due because Allstate did not promptly dispute their claim or request additional information.

It is well established in Maine law that § 2436(1) of the late payment statute requires an insurer to dispute or pay a claim within thirty days after receiving the claim. See, e.g., Chiapetta v. Lumbermens Mut. Ins. Co., 583 A.2d 198, 200 (Me. 1990). If an

insurer does neither, the claim is deemed "overdue" and the insurer is subject to penalties under the statute. One exception allows the insurer to request reasonable additional information from the claimant during the thirty-day period, resulting in the tolling of the thirty-day period. After the insurer receives the requested information, the thirty-day clock starts anew and begins ticking.

The record shows that the Rankins demanded payment on their claim in a September 28, 2000 letter received by Allstate on October 2, 2000. At that time, Allstate was in possession of the Rankins' most recent list of damaged items and missing items, which was dated September 24, 2000. The Rankins assert that the thirty-day clock began ticking as of October 2. The record does not indicate when Allstate received the Rankins' September 24, 2000 list of damaged and missing items, but it is clear that by October 2, 2001, Allstate was in possession of the list and the demand letter, thus the clock begins ticking October 2, 2001. See Bangor-Brewer Bowling Lanes, Inc. v. Commercial Union-York Ins. Co., No. 99-259, 2001 WL 1719238, *4 (Me. Super. July 03, 2001)(stating the date the insurer receives the insured's proof of loss is the controlling date for determining timeliness of the insurer's response). The Rankins argue that Allstate did not notify them within thirty days that additional information was required, nor did Allstate make a payment on the claim. However, the clock also stops when an insurer "disputes" the claim. Curtis v. Allstate Ins. Co., 787 A.2d 760, 769 (Me. 2002) (stating thirty-day period is tolled if insurer notifies insured it disputes the claim). The Rankins do not dispute that on October 3, 2000, Allstate responded to the Rankins' September 28 demand letter. (DSMF ¶¶ 8, 9; PRSMF ¶¶ 8, 9.) The Rankins apparently do not view this letter as a dispute to their claim. Allstate's letter in relevant part states

that: (1) Allstate needed a copy of the insureds' letter to the agent in order to investigate the Rankins' allegations that they would be covered for any and all losses incurred during the move; (2) further research was required regarding the value of items the Rankins claimed and an appraiser would be sought to help determine the values; (3) Allstate recommended that the Rankins do not dispose of the damaged items "until values are in agreement"; and (4) the policy only covers property against perils named in the policy and states that the only peril applicable to the Rankins' claim is the vehicle peril. (Id.; First Toolin Aff. Ex. B.) This letter predominantly appears to dispute the Rankins' claim.

The late payment statute demands certain requirements for disputes, thus Allstate's October 3 letter should be tested against the statue to determine whether it qualifies as a valid dispute. Section § 2436(2) requires that a dispute must be issued within the thirty-day window, must be based on a reasonable investigation of the claim, and must include sufficient detail to permit the insured to understand and respond to the insurer's position. See 24-A M.R.S.A § 2436(2). Here, Allstate responded in a letter dated the day after Allstate received the Rankins' September 28, 2000 claim. The letter includes the grounds upon which the claim is disputed and contains an enclosure of the relevant policy provisions. In the letter, Allstate disputes the value of the items the Rankins claimed, disputes coverage for items that fall outside the policy's named perils, and intends to investigate the Rankins' "allegations" regarding full coverage. Thus, the letter is written with sufficient detail to permit the Rankins to understand and respond to Allstate's position on the claim. The content of the letter indicates that Allstate's dispute is based upon a reasonable investigation of the claim. Based on the record evidence,

Allstate has met the requirements of §2436 for appropriately disputing a claim, thus the thirty-day clock stopped ticking on October 3, 2000.[6] See Curtis, 787 A.2d at 769 (stating that the existence of a legitimate controversy tolls the thirty-day period).

Although the Rankins' claim for damaged items and missing items was properly disputed within thirty days of Allstate's receipt of the claim, Allstate is not completely immune from the late payment statute. The late payment statute also imposes a penalty when an insurer fails to pay an "undisputed" claim or "any undisputed part of the claim" when due. See § 2436(3). Thus, as soon as a disputed claim becomes undisputed, in whole or in part, Allstate must pay the undisputed portion of the claim within thirty days. This is the point Allstate addressed in its motion. (Def.'s Mot. Summ. J. (DMSJ) at 4.) Allstate asserts that the late payment statue does not apply unless there has been an ascertainment of the loss and cites Greenvall v. Me. Mut. Fire Ins. Co., 715 A.2d 949 (Me. 1998) as support.

A disputed claim does not become undisputed unless two events occur: (1) the insurer has received proof of loss and (2) ascertainment of the loss has been made either by the parties' agreement or by filing with the insured an award by arbitrators as provided for in the policy. See 24-A M.R.S.A. § 2436(1). The Rankins point out that an appraisal was conducted in October of 2000. However, it is not clear from the record when the appraiser completed the appraisal report. The record only provides that Allstate received

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[6] In their response opposing summary judgment, the Rankins appear to argue that their December 2000 demand for payment on their "theft" loss and February 13, 2001 list of "stolen" items acts as a new claim. (PRMSJ at 8.) However, in October 2000, Allstate disputed the Rankins' September 2000 claim for items missing under the same circumstance, stating that the only policy provision applicable to their loss is the vehicle peril, which covers items damaged in connection with a vehicle. Thus, the Rankins' second submission of essentially the same claim does not create a new thirty-day period in which Allstate should have responded.

the report on January 11, 2001 and that it was delayed to some extent due to the independent adjuster falling ill. Despite any delay that may have occurred, the statute requires payment of a claim within thirty days following receipt of the proof of loss and ascertainment of the loss either by the parties' agreement or by an award by arbitrators as provided under the policy. There is nothing in the record indicating an arbitrator was involved, thus there could not have been an award by an arbitrator. An ascertainment of loss could not be made until Allstate received the appraisers' report. Within two weeks after receiving the report, Allstate created the property loss worksheet and mailed it with a letter to the Rankins dated January 23, 2001, describing the covered property and valuation amounts. On February 13, 2001, the Rankins and Allstate entered into a written agreement regarding the undisputed portion of the claim. Thus, both prongs of the statutory requirement could not have been met until Allstate and the Rankins entered into this agreement. See Greenvall, 715 A.2d at 955 (holding that where a claim is disputed, the insurer's "obligations pursuant to the late payment statute arise only after ascertainment of the loss is made... either by agreement or arbitration award... ."). Pursuant to the February 13, 2001 agreement, Allstate paid its pro-rata portion of the undisputed claim on February 28, 2001. Based on the undisputed facts, Allstate paid the undisputed portion of the Rankins' damaged property loss within thirty days after proof of loss was received by Allstate and ascertainment of the loss was made by written agreement.[7]

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[7] The fact that there are material facts in dispute regarding whether Allstate paid the full amount of the Rankins' claim does not impact the present determination that Allstate has paid the "undisputed" portion of the Rankins' claim. The present analysis does not involve inquiry into whether Allstate paid the full amount for which it is ultimately liable under the policy, it inquires into whether the insurer paid the "undisputed" portion of the insured's claim within thirty days. The parties agree that Allstate paid the

As to the missing/stolen property portion of the Rankins' claim, initially there was no undisputed amount. Allstate disputed the missing items portion of the Rankins' claim on October 3, 2000, stating this loss was not covered under the policy. The Rankins' characterization of the missing items as stolen items and submission of a second demand letter in December of 2000, did not create an undisputed amount. Thus, the thirty-day clock did not begin ticking until an undisputed portion of the claim existed. Again, for an undisputed portion of a claim to be payable within thirty days, there must be an ascertainment of the loss by written agreement between the parties or by filing with the insured an award by arbitrators. See 24-A M.R.S.A. § 2436(1). Allstate asserts that the only agreement concerning the loss that might be held to satisfy this requirement is Allstate's determination of the undisputed amount due, which Allstate paid promptly thereafter. (DMSJ at 4.)

The Rankins agree that Allstate paid an undisputed portion of their theft loss on December 26, 2001. (PRMSJ at 8; DSMF ¶ 18; PRSMF ¶ 18.) However, they allege that Allstate could have investigated their theft loss earlier. This assertion does not amount to a violation of the late payment statute. During the interim between the Rankins' September 2000 claim and Allstate's December 2001 payment, Allstate's position was that the items were not covered under the theft peril as defined by the policy. (DSMF ¶¶ 9, 13; First Toolin Ex. B & E.) The existence of a legitimate controversy such as this between the parties tolls the thirty-day period. See Curtis, 787 A.2d at 769 (Me. 2002). The Rankins have failed to establish specific facts that demonstrate the existence of a trialworthy issue regarding whether Allstate failed to pay an undisputed amount of their

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undisputed portion of the claimed damaged property loss and the stolen property loss. (DMSJ at 4; PRMSJ at 8; DSMF ¶ 18; PRSMF ¶ 18.)

theft loss within thirty days. See Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)(stating that once the movant has made a preliminary showing that no genuine issue of material fact exists, the party opposing summary judgment must contradict by pointing to specific facts that demonstrate there is a trialworthy issue).

Based on the undisputed record Allstate properly disputed the Rankins' September 28 claim for both damaged items and missing items within the thirty-day time period. I further conclude that Allstate paid the two undisputed portions of the claim before they became overdue. Therefore, Allstate's motion for summary judgment is granted on Count VII.

E. Count VIII: Unfair Claims Settlement Practices, 24-A M.R.S.A. § 2436-A

The Unfair Claims Settlement Practices provision allows an insured to bring a civil action when injured by certain actions taken by the insured's own insurer. 24-A M.R.S.A. § 2436-A(1). The insurer may recover damages, reasonable attorney's fees, and interest on damages at the rate of 1½ percent per month. Id. In their complaint, the Rankins allege Allstate committed four violations of the statute, but in their memorandum they say Allstate committed three violations. (Am. Comp. at 7-8; PRSMF at 10-11.) Allstate asserts that it did not violate the Unfair Claims Settlement Practices statute. Each violation will be discussed independently.

1. Knowingly Misrepresenting Facts or Policy Provisions

A violation occurs when an insurer "[k]nowingly misrepresent[s] to an insured pertinent facts or policy provisions relating to coverage at issue." 24-A M.R.S.A. § 2436-A(1)(A). The Rankins allege Allstate knowingly misrepresented its policy by suggesting that the Rankins' missing property did not constitute a theft under the policy.

(Am. Compl. at 8.) It is clear from the record that the parties interpreted the theft peril provision differently. "To establish a knowing misrepresentation, a plaintiff must provide evidence demonstrating something more than a mere dispute between the insurer and insured as to the meaning of certain policy language." Curtis, 787 A.2d at 767 (citing Saucier v. Allstate, 742 A.2d 482, 489 (Me. 1999)). In order to survive summary judgment, the plaintiff must "generate an issue of fact that the insurer knew the policy said and meant one thing but told the insured something else." Id. The Rankins merely argue Allstate earlier could have obtained the same information it learned in the December 2001 discovery that prompted Allstate's payment on the loss. This argument does not place a material fact in dispute regarding whether Allstate knowingly committed a material misrepresentation of its policy. The Rankins' action for a material misrepresentation does not survive summary judgment. Cf. Saucier, 742 A.2d at 489 (stating that a violation is more than disputed policy language; it consists of a knowledgeable misrepresentation and awareness of a misrepresentation).

2. Failure to Acknowledge and Review Claim Within a Reasonable Time

An insurer violates § 2436-A(1)(B) by "[f]ailing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy." 24-A M.R.S.A. § 2436-A(1)(B). This provision requires "examination of any delay between an insurer's receipt of a written notice of claim and the insurer's ultimate action on that claim." Bangor-Brewer Bowling Lanes, Inc, 2001 WL 1719238, at *4. Allstate's position, supported by the record, is that it engaged in ongoing exchanges with the Rankins regarding their claims. The record reveals that Allstate disputed the

Rankins' September 2000 claim in a letter dated October 3, 2000. In this letter, Allstate acknowledged and denied the portion of the claim relating to missing items. Once denied, there was no immediate reason to further review this portion of the claim. Allstate also disputed the damaged property loss. After issuing the October letter, Allstate continued to acknowledge and review the damaged property loss and ultimately paid the undisputed portion within four months. Allstate later reconsidered its denial of the missing items and paid the undisputed portion of this loss in December 2001. The fact that the parties dispute some small amounts under the damaged property portion of the claim and that Allstate initially denied coverage of the "missing" items does not translate into a violation of its duty to "acknowledge and review claims" within a reasonable time.

3. Failure to Affirm or Deny Coverage Within a Reasonable Time

The Rankins allege Allstate violated § 2436-A(1)(D), which allows an action against the insurer for "[f]ailing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to the claim." See 24-A M.R.S.A. § 2436-A(1)(D). As previously stated, it is undisputed that by October 2, 2000 Allstate had received both the Rankins' September 2000 demand letter and list of damaged and missing items. It is undisputed that in an October 3, 2000 letter, Allstate informed the Rankins that Allstate then believed the only provision of the policy applicable to their loss was the vehicle peril provision. Thus, within a reasonable time Allstate denied coverage for the missing items and affirmed coverage for the items damaged by vehicle peril. Thus, summary judgment in favor of Allstate is appropriate for the alleged violation of §2436-A(1)(D).

4. Failure to Effectuate Prompt, Fair, and Equitable Settlement of Claims

The Rankins also allege that Allstate violated § 2436-A(1)(E) which prohibits an insurer from, "[w]ithout just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear." 24-A M.R.S.A. § 2436-A(1)(E). The statute defines "without just cause" by stating "... an insurer acts without just cause if it refuses to settle claims without a reasonable basis to contest liability, the amount of any damages, or the extent of any injuries claimed." 24-A M.R.S.A. § 2436-A(2). Summary judgment is not appropriate on the "theft" portion of the Rankins' claim because there is a disputed material fact as to whether Allstate refused without just cause to treat the "missing" items as stolen.[8] Allstate contends that as soon as it obtained the necessary information from the Rankins through their depositions it conceded the probability that the items had been stolen and paid the disputed amount. It contends that any delay in settling this portion of the claim, not attributable to legitimate disputes about value, is reasonably attributed to normal delays associated with litigation. The Rankins note that more than a year went by from when they filed their police report until the claim was paid and that by March, 2001, all the facts surrounding "missing" items had been developed, leading to the inescapable conclusion that a theft had occurred. The question of whether Allstate failed, without just cause, to effectuate a prompt, fair and equitable settlement of a submitted claim after liability had become reasonably clear is in dispute. Allstate has put forth by way of argument numerous

[8] I am satisfied that Allstate's payment of the undisputed portion of the damaged property loss pursuant to the February, 2001, agreement effectuated a prompt, fair and equitable settlement of that portion of the claim. The significant amounts that remain in dispute on that portion of the claim were disputed in large part because the items had "missing" parts and were otherwise disputed by Allstate as part of the theft loss.

reasons why it could not have made an earlier determination that the items had probably been stolen. If, as suggested by counsel's argument, the delay in ascertaining the coverage question can reasonably be attributed to the normal incidents of litigation, then perhaps Allstate did have a reasonable basis to deny coverage until the December, 2001, depositions. However, the summary judgment record does not conclusively establish what happened between December 2000 and December 2001. The Rankins submit record evidence that Allstate either had or could have had the necessary information long before December, 2001. In sum, summary judgment on Count VIII in favor of Allstate is denied as to § 2436-A(1)(E), regarding settlement of the theft portion of the claim only, and granted in all other respects.

Conclusion

I **GRANT** Allstate's motion for summary judgment on Count IV and VII and **DENY** summary judgment on Counts III and VI. Further, summary judgment on Count VIII is **GRANTED** in part to the extent it alleges a violation of § 2436-A(1)(A) – (D), and **DENIED** to the extent it alleges a violation of § 2436-A(1)(E) relating to the theft portion of the claim.

So Ordered.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 25, 2002

STNDRD

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 01-CV-45

RANKIN, et al v. RIGHT-ON-TIME MOVING, et al Filed: 03/02/01

Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Both

Demand: $200,000 Nature of Suit: 890

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:1331 Fed. Question: Breach of Contract

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[COR LD NTC]

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v.

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defendant [COR LD NTC]

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[term 05/17/01]

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